

THE PORT CASE.

Circuit Court Decides Against the Port.

of Oregon, upon the appeal of S. V. Anderson and Anderson, Appellants, vs. Tillamook, H. T. Botts, J. M. F. Leach, D. Fitzpatrick, J. M. F. Leach, Jr., and M. F. Leach, Respondents.

from the Circuit Court of Tillamook County. The Hon. H. L. Judge. Argued and submitted 1912. Ralph R. Duniway, (Jury in brief) for Appellants. J. M. F. Leach, Jr. for respondents. Bean J.

an action in the nature of a writ, brought by the state upon the application of S. V. Anderson and Anderson against H. T. Botts, J. M. F. Leach, D. Fitzpatrick, James J. M. F. Leach, and the Port of Tillamook, to determine the right of the respondents to act as a municipal corporation. From a judgment in defendants' favor, plaintiff appeals. Complaint is signed by the district attorney of the proper district. It is alleged that the defendants are unlawfully exercising a public office within the state of Oregon, to wit, the office of officers of the Port of Tillamook, without the same being duly incorporated; that the alleged port is a municipal corporation, attempted to be formed under the act of 1909 of Oregon, 1909, pp. 73-33; that the defendants are residents and taxpayers within the territory of the port; and that the defendants are attempting to issue a large amount of bonds and render the relations liable for the payment of a part thereof.

complaint avers in detail that the incorporation and the acts of the defendants are illegal, for the following reasons: (1) That the original Port of Tillamook was created by and organized under an act of the legislature approved February 21, 1899, Laws of Oregon, 1899, pp. 419-420, and has ever since existed as a municipal corporation that it included all of the corporate limits of the city of Tillamook, and fifty feet of each bank of Hogueart Slough, the east boundary of the city of Tillamook and including Dry Stock Bar; that the attempt to reincorporate the Port of Tillamook is illegal because the proceedings thereof, in violation of the provisions of Chap. 39, Laws of Oregon, 1909, by petition to the county court, by an election held pursuant thereto, embraced the same territory as included in the former port, together with a large additional area; that no notice of the election for incorporation of the present Port of Tillamook was published as required by law.

The defendants, in their answer, set up the proceedings under the act of 1909 for the organization of the port, and denied the other allegations of the complaint. The reply put in issue the matter contained in answer. Upon the trial of the cause in the circuit court, it was agreed that the burden of proof was upon the defendants, but no evidence was introduced, but evidence was introduced showing that the proceedings of the election had been held and posted. Plaintiff alleges that because of a failure to give notice of the special election, a large number of legal voters, who were opposed to the incorporation, were prevented from voting, and that the result was thereby changed.

Bean, J. The principal contentions of the part of plaintiff are: (1) That there was no authority of law for organizing or recognizing the present Port of Tillamook, and at the same time extending the boundaries thereof, so as to include territory outside the limits of the port, as created by the act of 1899; (2) that in the attempt to organize or recognize the Port of Tillamook, the defendants did not show that they complied with the statutory requirements of the law.

It is enacted by Section 366, L. O. L., that "An action at law may be maintained in the name of the state, upon information of the prosecuting attorney, or upon the relation of a private party against the person offending, in the following cases: (1) When any person shall usurp, intrude into, or unlawfully hold, or exercise any public office, civil or military, or any franchise within this state, or any office in incorporation either public or private, created or formed by or under the authority of this state; or (2) (3) When any association or number of persons act within this state, as a corporation, without being duly incorporated." By Section 363 L. O. L., the writ of habeas corpus is abolished. It is, however, only the form that is abrogated by this section. The jurisdiction and powers of the courts are not changed. The remedies heretofore obtainable under those forms may be obtained by an action at law. For an elaborate discussion of an action in the nature of a writ, and the proceedings thereon, see the opinion by Mr. Justice Moore, in the recent case of State ex rel. Brown v. Sengstachon, Or., 122 Pac. Rep. 292.

We will take up the questions referred to in the inverse order. In an action pertaining of the nature of quo warranto, in the absence of any legislation or controlling consideration to the contrary, the rule that the onus probandi is upon the respondent, applies, and the defendants must prove the existence of the corporate franchise which they are alleged to have usurped, and their title to the offices, with the wrongful claim or usurpation of which they are charged.

We find that in ordinary civil actions, the burden rests upon the plaintiff to allege and prove his title to the thing in controversy. In quo warranto proceedings, we find the rule reversed, and it rests upon the respondent to show his title to the office or franchise in dispute. If he fails to show complete title, judgment is rendered against him. While in civil actions plaintiff recovers from his own title, in an action in the nature of quo warranto, the respondent must show that he has a good title against the government.

Mr. Dillon, in his work on Municipal Corporations, Vol. 4 (5 ed.), Sec. 1558, says: "In a proceeding by information in the nature of a quo warranto the defendant must either disclaim or justify. If he disclaims, the state is at once entitled to judgment.

If he justifies, he must set out his title specifically. It is not enough to allege generally that he was duly elected or appointed to the office. He must plead facts, showing on the face of the plea that he has a valid title to the office. The State is not bound to show anything."

In Section 1554 Id., we find the following: "The certificate of election of an officer, or his commission, coming from the proper source, is prima facie evidence in favor of the holder; and in every proceeding, except a direct one to try the title of such holder, it is conclusive; but in quo warranto the court will go behind the certificate or commission, and inquire into the validity of the election or appointment, and decide the legal rights of the parties upon full investigation of the facts."

It is a well settled rule in Oregon that the notices required by statute to be given for a special election, constitute a condition precedent which must be observed in order to validate the measure to be voted at such election. The purpose of the notices is to inform the legal voters of the time, place and object of the election. Considering now the evidence produced by defendants, it appears that a petition, containing a requisite number of signatures, was presented to the county court of Tillamook county, requesting that the question of incorporating the port be submitted to the legal voters; that the county court made an order providing for the holding of a special election therefor, and directing the county clerk to give notice of such election to be held on the twenty-fourth day of August, 1909; that at a special session of the court on the 31st day of August, 1909; 248 votes having been cast in favor of incorporating the port and 172 votes against the same, the court made and entered a proclamation declaring the Port of Tillamook to be duly incorporated as a municipal corporation, pursuant to the act of 1909; that thereafter the governor appointed a board of five commissioners for said port, consisting of the defendants, H. T. Botts, A. G. Beala, D. Fitzpatrick, James Walton, Jr., and M. F. Leach, who duly qualified; that the commissioners, H. T. Botts and D. Fitzpatrick were re-elected at the general election, November 8, 1910, their term having expired; and that they qualified as such commissioners. Their certificates of election and appointment were produced in evidence.

As far as the form of the proceedings are concerned, we think the defendants made a prima facie case. The state does not require a record of the posting of such election notices. The defendants show a compliance with the statute up to the time that it was the duty of the clerk to issue and mail notices to the judges and clerks of the election in the different precincts. Then the law steps in with the presumption that this official duty has been regularly performed, which in itself stands as prima facie evidence that the notices were issued and posted.

The circuit court found that, pursuant to the order of the county court, the county clerk duly issued notices for the holding of a special election called by such order; that the notices were transmitted to the respective judges and clerks of the election in the various precincts described in the petition; and that the notices were, by such judges and clerks, duly posted within their several precincts more than 10 days prior to the holding of such election. This finding was warranted by the evidence.

The real cause of the controversy in this case was the extension of the limits of the original Port of Tillamook. It is asserted by the relators that there was no statute authorizing incorporation of ports to extend their boundaries, until the passage of the act of 1911 (See Laws of Oregon, 1911, p. 157). It was therefore impossible for the Port of Tillamook, as created by the act of 1899, and known as the legislative port, to take proceeding in 1909 to reorganize and extend its boundaries, at a time when there was no authority of law therefor.

The portions of the amendments to the constitution applicable to this question, are as follows: "The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the state of Oregon." "The initiative and referendum powers reserved to the people by this constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent of legal voters may be required to order the referendum nor more than 15 per cent to propose any measure, by the initiative, in any city or town."

In engrafting these amendments into the fundamental law of this state, the people inaugurated a scheme for local self government. They paved the way for the enactment of local or special measures. The qualifying words, "local" and "special," relating to municipal legislation, as used in art. IV, la, are synonymous terms and mean enactments intended to affect only certain persons, or to operate in specified localities only.

The distinction between a general law and a local law is not easily defined. It has often been found expedient to leave the matter open, to a considerable extent, for determination upon the special circumstances of each case. In the absence of any clear and express declaration to that effect, in the amendments to our organic law, which are the source from which the authority emanates, only those powers incident and germane to the municipal government may be deemed to be delegated or reserved. Such municipal corporations are always subject to the control and regulation of the lawmakers of the state by the constitution, under the initiative and referendum.

While these public corporations are capable of adopting and amending their charter, they still continue to be agencies of the state. A general control is left in the legislative assembly at the same time the people retain, under the initiative and referendum, full power over them. Therefore such municipal authority to act upon local matters should be exercised with due regard to the right of adjoining localities, and in harmony with the general plan of home rule. If a municipal corporation is permitted to extend its boundaries step by step, indefinitely, without the sanction of the state or people of the districts included in the extensions, it would subvert the very plan as expressed by the people in their sovereign power through the ballot, and not a reasonable exercise of the power conferred. To this extent, the proceedings in question are not "local" or "special" within the meaning of the constitution, and are not germane to the government of the port. They are inconsistent with the plain import of our organic law.

Section 3209, L. O. L., authorizing the annexation of new territory to municipal corporations, required the consent of the people of the area to be annexed. The same safeguard is contained in the act of 1911, which provides for the changing of the boundaries of ports, and prescribes the manner for proceeding to annex new territory thereto. See laws of Oregon, 1911. This is a salutary requirement and seems to be the policy of the law. It is within the spirit and letter of the constitutional provision for the enactment of local measures by means of the initiative. We know of no authority, either delegated or reserved to the people of a municipal corporation, permitting the enactment of a local measure for the extension of the boundaries of the municipality so as to include a large section of country, without the consent of the legal voters who reside in the area to be annexed. There is no doubt but that the people of the whole state could pass such a law. The assumption of such power by the Port of Tillamook is not in consonance with our laws granting to municipalities and districts, the privilege to enact local or special laws.

An attempt was made to repeal the charter granted to the Port of Tillamook by the legislature, the effect thereof was not a reorganization of the port within the contemplation of the provisions of the laws of 1909. We see no reason why the original Port of Tillamook is not a valid corporation. It appears that the main purpose of election was to change the boundaries of the Port of Tillamook so as to embrace new territory. The question of annexation was not submitted in such a manner as to allow the legal voters of the area to be amended, to vote separately from those within the limits of the municipality. It is indicated, as far as can be ascertained from the ballot, that the outside voters were opposed to annexation. The election held, and the action taken pursuant thereto, did not effectuate an enlargement of the port, and were unauthorized and void.

A discussion of many of the questions referred to in the briefs, would be unfruitful, as the necessary legislation for the extension of the boundaries of incorporated ports was enacted in 1911. In conformity with section 3, article VII of the constitution of this state, all of the evidence being contained in the record, the judgment of the lower court will be reversed and a judgment entered here in accordance with this opinion.

Poor Old Boy.

I visited today the old home place, the place I lived when a lad; Where I whittled and fished from morn to night, or worked the plow with dad; I heard again the mocking birds sing, as once they sang with joy; But it seemed the song they sang today was "Poor old boy."

Through rooms that held memories of the past I wandered all alone, In the dark I found a trundle bed that once had been my own. I fancy I heard my mother's voice, again we knelt to pray. But instead of "Lay me down to sleep," "Poor old boy," she seemed to say.

Down past the yard o' vergrown with weeds, down past the old oak tree. I wandered to where, with sweat on brows, we plowed, my dad and me. The old plow leaned against the fence; as I raised it from its bed, All covered with rust, it mournfully creaked, "Poor old boy," was what it said.

I laid it back in the same old place where we left it years ago, When it seems I heard as in the days of old the dinner horn loudly blow. "Come wash for dinner, boy," said Dad, and we started to the stream. All I bathed my face in the nectar there. I awoke and found 'twas a dream.

I awoke. The sunlight streaming down cast a shadow by my side. Of buildings tall, and I could hear the din and noise outside. The whirl of cars through the crowded streets, the ceaseless, unending tread. Of the crowds below seemed to chant a strain, "Poor old boy," o'er and o'er they said.

O dear old homestead of the past! O dreams that n'er come true! My heart goes out in the silent night through long years back to you; And I know if tonight you could make a wish, a wish you know would come true. I know you would wish for the "Poor old boy" and the old folks back with you.

Annie Huff, in the New England Farmer.

When your child has whooping cough be careful to keep the cough loose and expectoration easy by giving Chamberlain's Cough Remedy as may be required. This remedy will also liquify the tough mucus and make it easier to expectorate. It has been used successfully in many epidemics and is safe and sure. For sale by all dealers.

When Buying, Buy Only the Best. Costs no more but gives best results. H. L. Blomquist, Esdaile, Wis., says his wife considers Foley's Honey and Tar Compound the best cough cure on the market. "She has tried various kinds but Foley's gives the best result of all." Lamar's Drug Store.

BOTTLE GOODS.

Table listing various bottle goods and their prices. Items include Pebbleford, Clarke's Pure Rye, Echo Spring, Old Crow, Hermitage, Cyrus Noble, O.T.O., Kentucky Dew, John Dewar & Sons, Black & White, V.O.P., Sandy Macdonald's, Hunter Baltimore, Canadian Club, I. W. Harper, Harvester Old Style, Monogram, Kentucky Dew, Billie Taylor, Coronet Dry Gin, A.V.H. Gin, Gordon Sloe Gin, Gordon Dry Gin, Rock and Rye, El Bart Gin, Virginia Dare Wine, Port Wine, Sherry Wine, Angelica Wine, Zenfendel Wine, Tokey, Claret, White Grape Juice, Local Beer, Domestic Beer.

Special Prices for Family Trade.

Table listing special prices for family trade. Items include Keg Beer (15 gallons \$5.75), Keg Beer (10 gallons 4.00), Local bottle Beer (6 dozen quarts 10.00), Local bottle Beer (10 dozen pints 11.00).

Domestic Beers.

Table listing domestic beers. Items include Budwiser Beer (6 dozen quarts \$15.00), Budwiser Beer (10 dozen pints 16.00), Old styler Lauger Beer (10 dozen pints 18.00).

WINES.

Table listing various wines. Items include White Port, Old Monk Brand (\$1.00 per gal), Port Wine (1.00 per gal), Sherry (1.00 per gal), Claret (75c per gal), Angelica (1.00 per gal), Zenfendel (1.25 per gal), Tokey (1.25 per gal).

WHISKEYS.

Table listing various whiskeys. Items include Monogram (per gal \$5.00), White Corn Whiskey (per gal 4.00), Harvester Old Style (per gal 4.25), McBrayer, 13 years old (per gal 6.00), Echo Spring (per gal 4.25), Chestnut Grove Rye (per gal 2.75), Kentucky Dew (per gal 2.25), Alcohol (per gal 4.00), Cornet Dry Gin (per gal 4.00).

Advertisement for BILLY STEPHENS, WHOLESALE AND RETAIL DEALER, Cor. First and First Avenue East.

Advertisement for DAIRYMEN'S SUPPLIES AND STEEL STOVES & RANGES. Includes image of a stove and text: HEADQUARTERS FOR DAIRYMEN'S SUPPLIES AND STEEL STOVES & RANGES. We carry a Large Stock of Hardware, Tinware, Glass and China, Oils, Paint, Varnish, Doors, Window Sashes. Agents for the Great Western Saw. ALEX McNAIR CO The Most Reliable Merchants in Tillamook County.

Advertisement for FOLEY KIDNEY PILLS. Text: FOLEY KIDNEY PILLS for backache, rheumatism, kidney or bladder trouble, and urinary irregularities. Foley Kidney Pills are tonic in action, quick in results. Refuse substitutes. Chas. I. Clough, Tillamook.

Advertisement for Ask for Mokatil. Text: Ask for Mokatil. Home Made at the Cold Storage. Includes image of a person and text: Notice of Final Settlement.

Advertisement for Notice of Final Settlement. Text: Notice of Final Settlement. In the County Court of the State of Oregon, for the County of Tillamook. In the Matter of the Estate of William D. Jones, deceased. NOTICE IS HEREBY GIVEN, That the administrator of the Estate of William D. Jones, deceased, has filed in said county court his final account of his administration of said estate, and the county judge has appointed Tuesday the 2nd day of July, 1912 at 10 o'clock a.m., as the time for the hearing of objections to said final account and for the settlement thereof. Dated May 19th, 1912. DAVID W. JONES, Administrator. A. S. DRESSER & J. W. DRAFTER, Attorneys for said estate.

Advertisement for Helped to Keep Down Expenses. Text: Helped to Keep Down Expenses. Mrs. J. E. Henry, Akron, Mich., tells how she did so: "I was bothered with my kidneys and had to go nearly double. I tried a sample of Foley Kidney Pills and they did me so much good that I bought a bottle, and feel that they saved me a big doctor's bill." Lamar's Drug Store. Mrs. M. A. McLaughlin, 512 Jay St., Lacrosse, Wis., writes that she suffered all kinds of pains in her back and hips on account of kidney trouble and rheumatism. "I got some of Foley Kidney Pills and after taking them for a few days there was a wonderful change in my case, for the pain entirely left my back and hips and I am thankful there is such a medicine as Foley Kidney Pills." Lamar's Drug Store.